DEPARTMENT OF STATE REVENUE

03-20150022.LOF

Letter of Findings Number: 03-20150022
Withholding Tax
For Tax Years 2011-2013

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 requires the publication of this document in the Indiana Register. The document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business owner did not owe withholding tax for individuals. Owner was able to prove the Department's determination that the individuals in question were employees was incorrect.

ISSUE

I. Withholding Tax-Independent Contractors/Employees.

Authority: IC § 6-8.1-5-1; 45 IAC 3.1-1-97; Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088 (Ind. Ct. App. 2008); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); IC § 6-3-4-8; Longmire v. Indiana Dep't of State Revenue, 638 N.E.2d 894 (Ind. Tax Ct. 1994); Letter of Finding 03-20130123 (October, 30 2013).

Taxpayer protests imposition of withholding tax based upon the Department's classification of individuals as employees.

STATEMENT OF FACTS

Taxpayer is an Indiana business. Taxpayer's business consists of auto detailing of individual and dealership vehicles. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had under-remitted on its state and county withholding tax for the tax years 2011 through 2013. The Department determined that certain individuals who performed the vehicle detailing were employees and withholding tax was due on their wages. The Department therefore issued proposed assessments for state and county withholding tax for the tax years 2011-2013. Taxpayer protests these proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Withholding Tax-Independent Contractors/Employees.

DISCUSSION

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong.

A. Audit Findings.

The Department reviewed Taxpayer's business records and books and determined that several employees were being treated as independent contractors instead of employees. The Department determined that Taxpayer controlled when, where, and how work would be completed; the individuals were given 24 hours to turnover vehicles. The audit report stated that Taxpayer controlled when work would be completed by giving the individuals a day of advance notice that work needed to be completed and what type of work needed to be completed; all work was done on Taxpayer's premises. Taxpayer also provided equipment such as power washers, vacuums,

and towels. The Department determined that individuals were paid weekly on the basis of the number of cars that were detailed by that individual that week; individuals did not have the ability to make a profit or suffer losses.

Even though some individuals worked for other companies, the Department determined that the individuals' work was integral and essential to the success of Taxpayer's business. Taxpayer did issue W2's to some employees but issued 1099s to the individuals in question in this protest who did the exact same work.

Finally, the audit stated that there were no written contracts that explained the relationship between Taxpayer and individuals or how individuals will be paid.

B. Taxpayer's Protest.

Taxpayer claims individuals were independent contractors. Taxpayer argues that it did not exercise control over how work was done or in what order detail work was done. Taxpayer's "review" of the individuals' work was an "eye test," meaning that Taxpayer looked to see if the vehicle looked like it was supposed to look. Taxpayer states, that the individuals who performed the work would take the vehicles off the dealership property. Taxpayer explained that it is the industry standard to have the vehicles away from a dealership for no more than 24 hours. Taxpayer claims the 24 period time frame is an industry standard and that the work was done without supervision.

In addition, Taxpayer argues that some of the individuals were in business for themselves or owned a separate business. Taxpayer provided the Department with the names of the individuals and/or their company name. Taxpayer also explains that one of the individuals received another dealership contract, and when that individual left Taxpayer's business he took the dealership contract with him.

Taxpayer also argues that it is industry standard for individuals to be paid on a per vehicle basis. Taxpayer went on to explain that when individuals detail many cars in a week they can choose to be paid at the end of the week rather than after each car is detailed.

Furthermore, Taxpayer explains that while it did supply space, power washers, vacuums, and towels, many of the individuals brought their own chemicals (wax or solvents), wax pads, brushes, and towels because these individuals had their own particular preference. When Taxpayer provided the items the use of Taxpayer's materials reduced the individuals' payments by a percentage of use.

Taxpayer argues that the individuals did not work set shifts; Taxpayer called the individuals either the day of or the day before work was needed. Individuals could refuse that work and the relationship with the Taxpayer did not necessarily terminate any future work.

Taxpayer's main argument rests on the fact that the Taxpayer and individuals believed their relationship was that of independent contractors and not employer-employee relationship. The individuals completed and Taxpayer provided some copies of Workers Compensation Clearance Certificate Applications. Some individuals also purchased their own insurance. Also, all individuals were given 1099s.

C. Discussion

IC § 6-3-4-8(a) provides that employers must "withhold, collect, and pay over income tax on wages paid to . . . employees." The relevant regulation 45 IAC 3.1-1-97, states that employers must "withhold Federal taxes pursuant to the Internal Revenue Code," and are also "required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax."

If Taxpayer hired individuals as independent contractors it would not be required to withhold or remit withholding tax. The employment relationship determines whether an individual worker is an independent contractor or an employee. An employer-employee relationship "exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished." Longmire v. Indiana Dep't of State Revenue, 638 N.E.2d 894, 897 (Ind. Tax Ct. 1994).

The Department notes that the Court of Appeals of Indiana addressed the problem of determining if a person is an employee or an independent contractor in Snell v. C.J. Jenkins Enterprises, Inc., 881 N.E.2d 1088 (Ind. Ct. App. 2008). In that case, the plaintiff (Snell) wanted to be considered an employee in order to recover some money, which he believed was owed by the defendant (Enterprises), using Indiana wage statutes. The court determined that the plaintiff was an independent contractor. The court explained:

> Because the question at issue here is whether Snell was Jenkins's employee or an independent contractor, we too will employ the ten-factor test pursuant to the Supreme Court's direction in Moberly. These ten factors are as follows:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
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> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.
> Id. at 1091.

The court discussed each factor and determined whether that particular factor weighed towards Snell's status as an employee or an independent contractor. The court also considered how strongly each factor weighed in which direction. Ultimately, the court determined that enough factors weighed strongly enough to rule that Snell was an independent contractor.

Taxpayer argues that it meets the factors listed above to show it hired the individuals as independent contractors. Taxpayer also relies on Letter of Finding 03-20130123 (October, 30 2013), 20131030 Ind. Reg. 045130465NRA, to show that even if the ten point test is not met the assessment is reduced by the amount listed in the 1099s. In the instant case, Taxpayer discussed the ten factors listed in Moberly. There was no written agreement laying out the terms of employment or whether Taxpayer would treat the individuals as employees or independent contractors. Taxpayer paid the individuals based on how many cars they detailed, and Taxpayer did not pay any persons hired by the individuals to assist with the detailing. Also, the individuals could choose whether to work or not when Taxpayer called them. Taxpayer provided the 1099s for the individuals in question. Taxpayer also provided Workmen's Compensation Clearance Certificate Applications to show that Taxpayer and individuals thought their relationship that of an independent contractor. Finally, Taxpayer provided one of the individual's insurance policy and several individuals' W-9s. Taxpayer's documentation shows that more of the Moberly factors weigh in Taxpayer's favor.

There is enough documentation to establish the status of the individuals and, as previously mentioned, the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c). In this case, Taxpayer has shown that several of the ten factors weigh in its favor; the factors include (f), (g), and (i) Therefore, Taxpayer has met the burden of proving the proposed assessments incorrect.

FINDING

Taxpayer's protest is sustained.

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